IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1663

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, ET AL.,
Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION, AND BREWERY WORKERS PENSION FUND, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents Brewery Workers Pension Fund and its former trustees oppose the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit issued in this case on January 10, 1979.

Question Presented

Whether the Court of Appeals properly applied Section 514(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(b)(1), to the particular facts of this case involving an agreement to merge two multiemployer pension funds, executed and repudiated before January 1, 1975.

Statement of the Case

This is the third court action in which petitioners have sought to avoid their obligation to merge the petitioner New York State Teamsters Conference Pension and Retirement Fund ("Teamsters Fund") with the respondent Brewery Workers Pension Fund ("Brewery Fund") pursuant to an agreement executed in 1973. The proceedings in the New York State courts and the relevant facts of this lawsuit are set forth in the opinions below and will not be repeated here.

The opinion below does not mention that a week before commencement of this suit, Teamsters Fund participants brought an action in the District Court for the Western District of New York seeking to enjoin the merger as violative of ERISA. That action was dismissed for failure to state a claim. *Cicatello* v. *Brewery Workers Pension Fund*, 434 F. Supp. 950 (W.D.N.Y. 1977), *aff'd*, 578 F.2d 1366 (2d Cir. 1978).

REASONS FOR DENYING THE WRIT

I. No Important Federal Question Is Presented In This Case

Petitioners agree with the decision below that ERISA does not preempt state law "with respect to any cause of action which arose, or any act or omission which occurred before January 1, 1975," Section 514(b)(1) of ERISA, 29 U.S.C. § 1144(b)(1) (Pet. pp. 16-17). The only question raised by the petition is whether the Court of Appeals erred in applying Section 514(b)(1) to the unique and complex facts of this case, involving a particular agreement to merge two pension funds and protracted litigation over the enforceability of that agreement. ERISA has now been in effect more than four years, and there is therefore no discernible possibility that the decision below will affect other litigants.

The Court of Appeals held that the federal court lacked subject matter jurisdiction over this dispute because of these undisputed facts:

1. The merger agreement was executed before January 1, 1975;

2. Petitioners repudiated the merger agreement before January 1, 1975;

3. The 1974 suit to compel specific performance of the merger agreement was not premature and petitioners never contended that it was; and

4. The New York State court declared the agreement to be "valid, binding and enforceable" and directed petitioners to "specifically perform the agreement."

Petitioners' principal argument, that the pre-ERISA agreement could not have been the subject of a mature cause of action to compel performance before IRS approval of the agreement, was rejected by the court below, which based its decision on settled principles of contract law and the plain language of Section 514(b)(1) as applied to these particular facts.*

The court did not hold, as petitioners state, "that the repudiation of the agreement was an anticipatory breach which eliminated IRS approval as a precondition to the

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* Contrary to petitioners' assertion that IRS approval of the merger was required by law (Pet. p. 19), Treasury Department regulations merely provide a method whereby parties may obtain an advance determination of the continuing qualified status of a pension plan. Treas. Reg. § 601.201(o), 26 C.F.R. § 601.201(o) (1978). Since the merger agreement's provision for IRS approval was purely contractual, cases involving State and federal licensing requirements cited by petitioners (Pet. pp. 20, 23) are both factually and legally irrelevant.

merger." (Pet. p. 18). It merely noted that the Teamsters Fund had refused to assist in seeking IRS approval of the merger agreement and, without reaching the question whether that refusal constituted a waiver of the provision for IRS approval, determined that the Teamsters Fund's anticipatory breach

> "effectively eliminated IRS' approval *as a pre-condition to a suit by the Brewery Fund to enforce specifically the agreement's terms.*" Slip Op. at 10 (emphasis supplied).

That determination raises no important question of federal law. As the court below stated:

> "Under traditional doctrine, repudiation constitutes a breach of contract even though made in advance of the time performance is due." Slip Op. at 9-10.

The New York appellate court also held that a cause of action to enforce the merger agreement arose in February 1974 when petitioners repudiated the agreement and that:

> "The fact that plaintiffs were required to bring a supplemental proceeding to enforce the judgment because of defendants' failure to comply with the earlier decision can mandate no different result. The present application was based upon the same facts as supported the original complaint." *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension & Retirement Fund,* 62 A.D.2d 1046, 1047, 404 N.Y.S.2d 158, 161 (2d Dep't 1978).

The Court of Appeals thus correctly determined that the physical transfer of assets after January 1, 1975, resulting directly from a post-judgment proceeding to hold the Teamsters Fund in contempt, occurred "with respect to [a] cause of action which arose . . . before January 1, 1975." 29 U.S.C. §1144(b)(1).

II. The Court Below Fully Considered And Correctly Decided The Issue In Accord With The Decisions Of This And Other Courts

The Court of Appeals' application of Section 514(b)(1) of ERISA to the particular facts of this case is consistent with this Court's interpretation of that section in *Malone* v. *White Motor Corp.,* 435 U.S. 497, 499 n.1 (1978):

> "Because ERISA did not become effective until January 1, 1975, and expressly disclaims any effect with regard to events before that date, it does not apply to the facts of this case."

With respect to the specific exemption in Section 514 (b)(1) for pre-existing causes of action, the First Circuit recently stated:

> "The most natural reading of [Section 514(b)(1) of ERISA] is that state substantive law *continues* to apply to causes of action that arose prior to 1975." *Cowan* v. *Keystone Employee Profit Sharing Fund,* 586 F.2d 888, 893 (1st Cir. 1978) (emphasis supplied).

See also Azzaro v. *Harnett,* 414 F. Supp. 473, 475 (S.D.N.Y. 1976), *aff'd,* 553 F.2d 93 (2d Cir.), *cert. denied,* 434 U.S. 824 (1977) (Section 514(b)(1) leaves to the States "what is essentially a cleanup role, . . . the disposition of causes of action and disputes with respect to employee benefit plans existing before January 1, 1975"); *Martin* v. *Bankers Trust Co.,* 565 F.2d 1276 (4th Cir. 1977); *Morowitz* v. *Bakery Drivers Local 802 Pension Fund,* 79 Lab. Cas. ¶11,602 (E.D.N.Y. 1976).

Other courts, interpreting the "acts or omissions" clause of Section 514(b)(1), have likewise held that ERISA is not applicable to disputes existing prior to January 1, 1975. *Reuther* v. *Trustees of Trucking Employees of Passaic & Bergen County Welfare Fund,* 575 F.2d 1074, 1078 (3rd Cir. 1978); *Nolan* v. *Meyer,* 520 F.2d 1276, 1278 n.2 (2d

Cir.), *cert. denied,* 423 U.S. 1034 (1975); *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F. Supp. 1005 (N.D. Ohio 1976).

The decision below is also in accord with the legislative history of Section 514(b)(1). Representative Dent, Chairman of the General Subcommittee on Labor and sponsor of the House Pension Bill, stated, with respect to the statute's effect on cases pending in State courts on the effective date of Section 514:

> "—[Mr. Thomson.]—The question is: Will the preemption of State law nullify any *pending litigation* a State may be involved in concerning violations of State law which occurred prior to the preemption?
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> "—Mr. Dent.—Mr. Chairman, in reply to the inquiry of the gentleman from Wisconsin (Mr. Thomson) may I say that in my opinion they would be able to proceed with any pending judicial proceeding. So far as I know *we have no retroactivity in any such case.*" II Legislative History of ERISA 3404 (Feb. 26, 1974—House: Floor Debate on H.R. 2 Employee Benefit Security Act) (emphasis supplied).

Petitioners have not demonstrated that the decision below is in conflict with any decision of this Court. Their conclusory assertion that *Fleming* v. *Rhodes,* 331 U.S. 100 (1947), *Louisville & N. R.R.* v. *Mottley,* 219 U.S. 467 (1911) and *Brewing Corp. of America* v. *Cleveland Trust Co.,* 185 F.2d 482 (6th Cir. 1950), each involved "a §514(b)(1) type clause" and "factual contexts nearly identical to the case at bar" (Pet. p. 16 n.10), is unsupported and incorrect. Neither the statutes involved nor the factual circumstances in those cases are remotely relevant here.

The statute in issue in *Mottley* was Section 6 of the Interstate Commerce Act of February 4, 1887, *as amended by* Act of June 29, 1906, C. 3591 §2, 34 Stat. 586. That

statute contained no savings provision whatever, and this Court noted that Congress had considered "what exceptions, if any, should be made" and resolved the issue "without making any exceptions of *existing contracts,*" 219 U.S. at 479. By contrast, in enacting Section 514(b)(1) of ERISA, Congress expressly precluded application of ERISA to causes of action which arose, or acts or omissions which occurred, before January 1, 1975.

Both *Fleming* and *Brewing Corp.* involved the Price Control Extension Act of 1946, Pub. L. No. 548, 60 Stat. 664 (1946), which re-enacted the Emergency Price Control Act of 1942 after it had expired by its terms on June 30, 1946. In those cases the re-enacted statute was applied to transactions undertaken during the intervening 25-day period but not completed until after the statutory controls had been reinstated. Those situations are hardly analogous to the enactment of the first comprehensive federal statute in an area previously regulated exclusively by the States. *See Malone* v. *White Motor Corp., supra* at 507. (The Welfare and Pension Plans Disclosure Act, 29 U.S.C. §301 *et seq.,* repealed by ERISA "was designed 'to leave to the States the detailed regulations relating to insurance, trusts and other phases of their operations' " (citation omitted).)

The savings provision of the statute involved in *Fleming* and *Brewing Corp.,* Section 18, did not even involve preemption of State law. That section merely provided that, despite the express retroactive effect of the July 25, 1946 re-enactment, no "act or transaction or omission or failure to act" occurring during the twenty-five day period would be deemed a violation of the Act. Section 514(b)(1) of ERISA, on the other hand, not only precludes retroactive effect of the statute but also expressly prohibits prospective application where the dispute involves a cause of action which arose before January 1, 1975.

Accordingly, the lower court's ruling that the objective of "an orderly transition from state to federal regulation"

is accomplished by application of State law to this case is consistent both with the decisions of this and other courts, and with the intent of Congress.

III. The Question Presented By Petitioners Would Not, In Any Event, Be Dispositive

Even if the Court of Appeals had erred in applying Section 514(b)(1) to the facts of this case, the judgment of the District Court could be reversed only if, on remand, the Court of Appeals were to reject the District Court's alternative ground for dismissal, that petitioners' claims were barred by *res judicata*. Moreover, if that were to occur, the case would still have to be remanded to the District Court for consideration of respondents' other contentions that petitioners are barred by laches and that the specific provision of ERISA invoked, Section 208, 29 U.S.C. § 1058, by its own terms does not apply to the type of merger involved in this case. The District Court characterized these issues as "substantial," but found it unnecessary to decide them (Pet. App. B at 13a).

Under such circumstances and in light of the already protracted litigation over an agreement executed six years ago, review of the question presented by petitioners should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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